IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5166 OF 2004

P. Tarachand ... Petitioner

Vs.

Chimanlal Ramji Savla & Ors. ... Respondents

Mr. S.I. Shamin i/b Shamin & Co. for the petitioner.

Mr. Piyush Shah for respondents 1 to 7.

Mr. P.S. Dani for respondent 8.

CORAM: SMT. RANJANA DESAI, J.

DATED: 25TH JANUARY, 2005.

P.C.:-

1. The petitioner is original defendant 1 in R.A.E. Suit No.736/1602 of 1994. The suit was filed against defendant 1, who is a tenant, on the ground of non user of the suit premises. The plaintiffs only impleaded defendant 1 in the suit. It is an admitted position that defendant 2 having learnt about the suit, made an application in the suit stating that he may be impleaded as party defendant and, accordingly, he was impleaded as party defendant. In the said suit, defendant 1 did not file a written statement but took out an Interim Notice No.3980 of 2003 as late as on 7/9/2003 praying that he may be permitted to file a written statement. By the impugned order, the trial court has rejected the said notice and, hence, this writ petition.

2. I have heard, at considerable length, Mr. Shamin, the learned counsel appearing for the petitioner/defendant 1. He contended that defendant 1 is an uneducated old person. He had engaged an advocate, who passed away in the year 1995. Thereafter, he engaged another advocate, who filed the application on 7/9/2003 praying for permission to file written statement. Thereafter, defendant 1 engaged a third advocate. He submitted that on account of the unfortunate demise of the first advocate and subsequent change of advocates, proper steps which should have been taken by defendant 1 were not taken by him. Besides, being an illiterate person, defendant 1 did not understand the implications of not taking prompt action. Therefore, in the circumstances of the case, a kindly view may be taken and defendant 1 be allowed to file his written statement after imposing heavy costs on him, in the interest of justice. This is more so because the plaintiffs, who have filed the suit have no objection to defendant 1 filing his written statement.

3. Mr. Dani, the learned counsel appearing for respondent 2, however, made a serious grievance. He submitted that it is apparent that there is a collusion between defendant 1 and the plaintiffs and, therefore, to this belated application for permission to file written statement, there is no objection from the plaintiffs.

4. I find substance in this submission of Mr. Dani. The suit came to be filed in the year 1994. The suit was filed only against defendant 1. On 10/8/1994, an ad-interim injunction notice was taken out by the plaintiffs against defendant 1. The plaint and ad-interim injunction notice were served on defendant 1. On 16/1/1995, defendant 1 filed his affidavit in reply in the said interim injunction notice No.3549 of 1994. The said notice was made absolute on 25/8/2000. On the application of defendant 2 dated 8/11/1994, he was made a party defendant to the suit on 15-16/1/1998. Against this order, no appeal was filed. On 17/12/1998, the plaintiffs served upon defendants 1 and 2 a copy of the summons, ad-interim injunction notice and the plaint. Defendant 2 filed his written statement on 13/10/1999 and issues were framed by the court on 16/7/2001. The petitioner and both the defendants received a copy of the same. On 13/2/2003, affidavit of examination-in-chief was filed by the plaintiffs. On the same day, both the defendants received a copy of the same. On 3/7/2003, 21/7/2003 and 29/7/2003 Defendant 1 was present in the court. He declined to cross-examine the plaintiffs and the statement of defendant 1 is recorded by the learned judge to that effect. This fact cannot be disputed by defendant 1 because it is a matter of record. Thereafter, cross-examination of plaintiffs by defendant 2 commenced. It continued till 29/7/2003. It appears that on 29/7/2003 during cross-examination of the plaintiffs which was being conducted by defendant 2, an

application being Notice No.3770 of 2003 was made by defendant 1 with a request that the trial court should permit defendant 1 to cross-examine the plaintiffs. While that notice was pending, on 7/9/2003, another application being Notice No.3980 of 2003 was made for permission to file a written statement and also to cross-examine the plaintiffs. On 1/10/2003, the first application being Notice No.3770 of 2003, which was made for permission to cross-examine the plaintiffs was withdrawn. Notice No.3980 of 2003 was then disposed of by the impugned order.

5. My attention is also drawn to the Rozanama of the suit which clearly indicates that defendant 1 has been remaining present in the trial court on almost all dates. The above facts and the Rozanama persuade me to hold that the claim made by defendant 1 that he was unaware of the proceedings or that his advocates did not take prompt action or that because of his advocates' inaction he was not able to file his written statement appear to be not true. Defendant 1 is very much aware of the progress of the suit. In fact, he has filed his affidavit. He has remained present and, all the suit proceedings have been served on him from time to time. The claim made by defendant 1 that on account of inaction of his lawyer, he was not able to take prompt steps is not even stated in his application made for permission to file written statement. There is not a single averment in that behalf in the said cryptic application. Since no case was made

out, the trial court was justified in rejecting his application. Besides, it appears to me that after having all along taken a stand that defendant 1 does not want to cross-examine the plaintiffs, at a belated stage after the plaintiffs' examination-in-chief is completed and defendant 2 has began his cross-examination, it is improper on the part of defendant 1 to contend that he wants to file his written statement. I find substance in Mr. Dani's submission that it will prejudice the rights of defendant 2. I am, therefore, of the opinion that the trial court was justified in rejecting the belated prayer of defendant 1 to file his written statement. No interference is, therefore, called for with the impugned judgment and order. However, in the interest of justice since the affidavit in reply of defendant 1 is on record, the trial court will look into it for proper determination of the issues before it. With this observation, the petition is dismissed.

6. All submissions of the parties are kept open.

(SMT. RANJANA DESAI, J.)